A

LYNAWATI ABDULLAH

v.

ABANG SUKORI ABANG HJ GOBIL & ORS

B

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[JUDICIAL REVIEW NO: KCH-13JR-13-11-2012]
22 APRIL 2013

C ***NATIVE LAW AND CUSTOM:*** *Jurisdiction of court - Certiorari - Land dispute - Native Court of Appeal decided that first respondent was rightful owner of lands - Applicant held to be a non-native and could not acquire any right over lands - Application for certiorari against decision of Native Court of Appeal to High Court - Whether High Court vested* D *with power to review decision of Native Court of Appeal - Decision in Haji Laugan Tarki bin Mohd Noor v. Mahkamah Anak Negeri Penampang - Whether binding*

CIVIL PROCEDURE: *Certiorari - Application for leave - Application* E *for certiorari against decision of Native Court of Appeal to High Court - Native Court of Appeal held applicant non-native and could not acquire any right over land - Whether High Court vested with power to review decision of Native Court of Appeal - Decision in Haji Laugan Tarki bin Mohd Noor v. Mahkamah Anak Negeri Penampang - Whether binding*

F The applicant had claimed for six pieces of land in Kuching based on the custom of 'serah' or transfer on payment of 'sagu hati' or compensation from their original Malay owners. The said lands were subsequently acquired by the State Government of Sarawak for the purpose of building a link road. After being informed that G the first respondent was also a claimant of the said lands, the applicant filed a claim in the Chief's Court Kuching in which she succeeded. The applicant also succeeded when an appeal against the decision was brought to the Chief Superior Court. However, the decision was overturned by the District Native Court and H affirmed by the Resident Native Court which declared the first respondent as the rightful owner of the said lands. The Native Court of Appeal affirmed this decision, confirming that the applicant, as a non-native could not acquire any right over the said land. Hence, the present application for *certiorari* to the High I Court. The issue that arose for consideration was whether the High Court is vested with the power to review the decision of a Native Court of Appeal. The applicant argued that the Supreme

Court had set a legal precedent when it quashed the decision of the Penampang Native Court in *Haji Laugan Tarki bin Mohd Noor v. Mahkamah Anak Negeri Penampang* ('*Haji Laugan*'s case'). A

Held (dismissing application with costs):

B

(1) The law applicable at the time when *Haji Laugan*'s case was decided was the Native Courts Ordinance of Sabah (Cap. 86) ('the Ordinance'). The Supreme Court was troubled by the unclear breaches or offences against native law or custom in s. 5 of the Ordinance. It was equally vexed by the unlimited powers of punishment conferred on the Native Courts by s. 7 of the Ordinance which, according to the Supreme Court, was against the intention expressed in item 13 of List IIA of the Supplementary List for the States of Sabah and Sarawak of the Ninth Schedule of the Federal Constitution. It was where the jurisdiction and powers of the Native Courts 'shall not include jurisdiction in respect of offences except in so far as conferred by federal law'. Thus, it concluded that the power to impose a prison sentence under s. 7 of the Ordinance as opposed to power to award compensation could only be authorised by a federal legislation to be passed in accordance with the said item 13 and 'the Penampang Native Court had therefore acted without or in excess of jurisdiction when it imposed the sentence on the appellant'. (paras 6-8) C D E

(2) The grave concerns have been addressed by the repeal of the Ordinance in 1993. In its place now is the Native Courts Enactment of 1992 ('the Enactment') which has a comprehensive and clear provisions on the breaches of customary law together with their prescribed penalties. Under s. 11 of the Enactment, a sentence of imprisonment imposed by a Native Court must be endorsed by a Magistrate. The law, in other words, have moved with time and when *Haji Laugan*'s case was viewed against this development in the law, its *ratio* could no longer be applied. (paras 9) F G

H

(3) The constitution of the Native Court of Appeal under the Sabah Enactment has made it on par with the High Court for it provides that a judge of the High Court or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. In Sarawak, there is only a slight difference to the constitution of the Native Court of Appeal in that its President is not only a I

A High Court Judge but one who has held or is qualified under the Federal Constitution to be appointed as a High Court Judge (s. 13(3)(b) of the Native Courts Ordinance 1992). Given the constitutions of the Native Court of Appeals in both States, these appellate courts are not 'inferior courts' B upon which the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native Courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal if every dissatisfied native litigant at the subordinate court level could C run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain. (para 10)

(4) A comparison could be drawn between the Native Court of D Appeals in both states to the Election Court established under the Election Offences Act 1954 ('the Act'). An election judge is specified in s. 33 of the Act as the Chief Judge or a High Court Judge nominated by him for that purpose. The courts have been consistent in their view that a decision of an E Election Judge is not amenable to judicial review by the High Court. This is on account that it is presided by a judge of co-ordinate jurisdiction with the High Court and is therefore not an inferior court. This same reasoning could be raised for the Native Court of Appeal. (para 11)

F **(5)** Although as stated in *Haji Laugan*'s case that the native courts are creatures of statutes, but just like the Syariah Courts, their creations, unlike the Industrial Courts or the Labour Courts, are specifically provided for in the Federal Constitution, in the State List (List II) and Supplementary G List (List IIA) of the Ninth Schedule, respectively although with no express provisions of their own like the civil courts. Even though by virtue of art. 121(1A) of the Federal Constitution the civil courts shall have no jurisdiction over the matters within the jurisdiction of the Syariah Court whereas H there is no such express provision in respect of the Native Court, the latter's position is still the same given the constitution of the Native Court of Appeal and the express creation of the Native Courts under the Federal Constitution. (para 12)

I **(6)** It is disrespect and meddling in each other's jurisdiction which would bring disharmony, not the mere existence of another system of courts because each court system is administering

laws peculiar to itself which, with respect, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constitution, powers and jurisdictions of each court system and mutual respect is accorded by one to the other, all three can co-exist and operate within their own spheres of influence under the judicial landscape of our country. (para 13)

Case(s) referred to:

Commissioner for Religious Affairs; Trengganu & Ors v. Tengku Mariam Tengku Sri Wa Raja & Anor [1970] 1 LNS 21 FC ***(refd)***

Dayang Kayang Dawila v. Mahkamah Anak Negeri, Lahad Datu [2005] 1 LNS 274 HC ***(refd)***

Haji Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang [1988] 1 LNS 147 SC ***(not foll)***

R v. Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107 ***(refd)***

Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1991] 1 ILR 117 ***(refd)***

Yong Teck Lee v. Harris Mohd Salleh & Anor [2002] 3 CLJ 422 CA ***(foll)***

Legislation referred to:

Election Offences Act 1954, s. 33
Federal Constitution, art. 121(1A)
Land Code (Sarawak) (Cap 81), s. 8
Native Courts Ordinance Sabah (Cap 86), ss. 5, 7, 10A
Native Courts Ordinance (Sarawak) 1992, ss. 11, 13(3)(b)
Penal Code, ss. 182, 499

For the applicant - See Chee How; M/s Baru Bian Advocates & Solicitors
For the respondents - Nur Azhar Bujang; State Legal Advisor, Sarawak

Reported by Najib Tamby

JUDGMENT

Rhodzariah Bujang J:

[1] This leave application to issue an order of *certiorari* raises an interesting question of law which is whether the High Court is vested with the power to review the decision of a Native Court of Appeal. The applicant in this case is aggrieved by the decision of the Native Court of Appeal which decided that she was a non-native prior to 21 July 2005. That determination of the Native Court of Appeal is fundamental to her claim for six pieces of land in Kuching North Land District which she acquired based on the

custom of 'serah' or transfer on payment of 'sagu hati' or compensation from their original Malay owners. The said lands were subsequently acquired by the State Government of Sarawak for the purpose of building a link road and she filed the claim in the Chief's Court Kuching after being informed by the lands and surveys department that the first respondent herein, one Abang Sukori bin Abang Hj Gobil was also a claimant of the said land. In that court of first instance, she won as well as in the appeal brought by the first respondent to the Chief's Superior Court. However, that decision was overturned by the District Native Court and affirmed by the Resident Native Court which in turn declared the first respondent as the rightful owner of the said lands. The Native Court of Appeal affirmed the aforesaid decision, confirming that the applicant as a non-native could not acquire any right over the said land.

[2] I must also make clear that though the application is made *ex parte*, given the novel and interesting point of law raised in it, I have ordered that it be served on the respondents who were then invited to make submissions on it.

[3] This case being at the leave stage, I should heed the guidelines adopted by the Supreme Court in *Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Bhd* [1991] 1 ILR 117 from the decision of the English Court of Appeal in *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, and they are:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as it necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
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> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in

> deciding whether to grant leave to appeal against an arbitrator's award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

Arguable Case

[4] The respondent's counsel, Mr Nur Azhar bin Bujang ("Mr Nur Azhar") submitted that this leave application is frivolous and vexatious because the applicant acquired the land in 2000 long before she was gazetted as a native by Gazette Notification No. 2279 dated 21 July, 2005. The acquisition of the land, said Mr Nur Azhar, was therefore contrary to s. 8 of the Land Code (Cap. 81) Sarawak and was illegal, null and void. That argument, in my view, takes a back seat to another and more pressing concern of mine when I first sighted this application, which have pre-occupied the submissions of both counsels as well. That legal point, which was stated at the outset of this judgment, is whether the decision of the Native Court of Appeal is justiciable or amendable to judicial review.

Justiciability, An Issue

[5] It is not an issue, submitted Mr Simon Siah for the applicant because the Supreme Court had set a legal precedent when it quashed the decision of the Penampang Native Court in *Haji Laugan Tarki Mohd Noor v. Mahkamah Anak Negeri Penampang* [1988] 1 LNS 147; [1988] 2 MLJ 85. He also cited another Sabahan case, *Dayang Kayang Dawila v. Mahkamah Anak Negeri, Lahad Datu* [2005] 1 LNS 274; [2005] 5 MLJ 603 which referred to the decision in *Haji Laugan*'s case. Although the principle of *stare decisis* dictates that I be bound by the Supreme Court's decision in *Haji Laugan*'s case, however after a minute reading of the decision and the provisions of the statutes in both Sabah and Sarawak under which the Native Courts (and that includes the Native Court of Appeal) are constituted, I would have to respectfully declare that I am not going to be shackled by it for these reasons.

[6] Firstly, the law applicable at the time *Haji Laugan*'s case was decided was the Native Courts Ordinance of Sabah (Cap. 86). Haji Laugan was convicted and sentenced to one month jail by the Penampang Native Court for the offence of slander. In his application for leave to issue *certiorari*, he deposed that the offence is also punishable under ss. 182 and 499 of the Penal Code. He

was arrested by the police after the complainant lodged a complaint against him and he said he feared that he would be charged again in the Magistrates' Court for the same offence and thus be subjected to double jeopardy.

[7] The Supreme Court in arriving at its decision was troubled by the unclear breaches or offences against native law or custom in s. 5 of the Native Courts Ordinance (Cap. 86) Sabah and expressed its views as follows:

> It is unfortunate that what are breaches or offences against native law or custom are not set out clearly in the Ordinance to avoid unnecessary argument on the jurisdiction of the Native Court. The very first question for the Native Court to consider is whether a particular act or conduct amounts to a breach of native law or custom. There is no guide on the exercise of this jurisdiction except for materials like Woodley's Codes and other materials. If, however, the Native Court decides that an act amounts to a breach of native law or custom, we do not think the civil court should interfere for it will be within the jurisdiction of the Native Court of Appeal under s. 10A of the Ordinance to determine such a question since under sub-s. (2) thereof an appeal shall lie as of right on any ground of appeal which involves the question of native law or custom alone.

[8] It is equally vexed by the unlimited powers of punishment conferred on the Native Courts by s. 7 of the Ordinance which according to the Supreme Court is against the intention expressed in item 13 of List IIA of the supplementary list for the States of Sabah and Sarawak of the Ninth Schedule of the Federal Constitution in that the jurisdiction and powers of the Native Courts "shall not include jurisdiction in respect of offences except in so far as conferred by federal law". Thus it concluded that the power to impose a prison sentence under s. 7 of the Ordinance as opposed to power to award compensation can only be authorised by a federal legislation to be passed in accordance with the said item 13 and "the Penampang Native Court had therefore acted without or in excess of jurisdiction when it imposed the sentence on the appellant" ie, Haji Laugan.

[9] The grave concerns expressed by the Sessions Court which formed, in my respectful view, the bedrock of its decision, have been addressed by the repeal of the Ordinance in 1993. In its place now is the Native Courts Ordinance of 1992 which has a comprehensive and clear provisions on the breaches of customary law together with their prescribed penalties. What is more under

s. 11 of the Enactment, a sentence of imprisonment imposed by a Native Court must be endorsed by a Magistrate. The law, in other words, have moved with time and when *Haji Laugan*'s case is viewed against this development in the law, its *ratio* can no longer be applied.

[10] Secondly, the constitution of the Native Court of Appeal under the Sabah Enactment has made it on par with the High Court for it provides that a judge of the High Court or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. In Sarawak, there is only a slight difference to the constitution of the Native Court of Appeal in that its President is not only a High Court Judge but one who has held or is qualified under the Federal Constitution to be appointed as a High Court Judge (see s. 13(3)(b) of the Native Courts Ordinance 1992 Sarawak). Given the constitutions of the Native Court of Appeal in both States, these appellate courts are not 'inferior courts' upon which the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native Courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal if every dissatisfied native litigant at the subordinate court level could run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain.

[11] Thirdly, a comparison can be drawn between the Native Court of Appeal in both states to the Election Court established under the Election Offences Act 1954. An election judge is specified in s. 33 of that legislation as the Chief Judge or a High Court Judge nominated by him for that purpose. The courts have been consistent in their view that a decision of an election judge is not amenable to judicial review by the High Court (see, for instance, the decision of the Court of Appeal in *Yong Teck Lee v. Harris Mohd Salleh & Anor* [2002] 3 CLJ 422; [2002] 3 MLJ 230 and for which leave to appeal to the Federal Court was refused). This on account that it is presided by a judge of co-ordinate jurisdiction with the High Court and is therefore not an inferior court. This same reasoning, in my view can be raised for the Native Court of Appeal.

[12] Fourthly, although as stated by the Supreme Court in *Haji Laugan*'s case that the native courts are creatures of statutes, but just like the Syariah courts, their creations, unlike say the

Industrial courts or the Labour courts, are specifically provided for in the Federal Constitution, in the State List (List II) and Supplementary List (List IIA) of the Ninth Schedule, respectively although with no express provisions of their own like the civil courts. Whilst I note that it was mentioned in *Haji Laugan*'s case that the Federal Court had in *Commissioner for Religious Affairs; Trengganu & Ors v. Tengku Mariam Tengku Sri Wa Raja & Anor* [1970] 1 LNS 21; [1970] 1 MLJ 222 affirmed the High Court's decision to question the validity of a wakaf issued by the mufti, which was published in the gazette, that clearly was not a decision of the Syariah Court that was called into question but that of a religious official. Even though I appreciate Mr Simon Siah's argument that by virtue of art. 121(1A) of the Federal Constitution the civil courts shall have no jurisdiction over the matters within the jurisdiction of the Syariah Court whereas there is no such express provision in respect of the Native Court, the latter's position in my view is still the same given the constitution of the Native Court of Appeal and the express creation of the Native Courts under the Federal Constitution.

Conclusion

[13] The Supreme Court in *Haji Laugan*'s case quoted p. 70 of Hickling's book, *Malaysian Law* in which the learned author justified the control of the High Court over Native Courts by saying that such a control is important since it is essential to have one supreme authority in any field of human activity. An English history illustrates, continues the learned author, two systems of courts with parallel authority cannot exist together in harmony. It is an opinion which I respectfully beg to differ. In my view, it is disrespect and meddling in each other's jurisdiction which would bring disharmony, not the mere existence of another system of courts because each court system is administering laws peculiar to itself which, with respect, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constitution, powers and jurisdictions of each court system and mutual respect is accorded by one to the other, all three can co-exist and operate within their own spheres of influence under the judicial landscape of our country. I would sum up by stating that the application for leave is dismissed with cost which has been agreed at RM500.